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Nos. 08-217 & 08-229

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IN THE

Supreme Court of the United States

MASSEY ENERGY COMPANY AND
CENTRAL WEST VIRGINIA ENERGY COMPANY,

Petitioners,

v.

WHEELING PITTSBURGH STEEL CORPORATION AND
MOUNTAIN STATE CARBON, LLC,

Respondents.

NISOURCE INC., ET AL.,

Petitioners,

v.

ESTATE OF GARRISON G. TAWNEY BY LELA ANN GOFF,
EXECUTRIX, ET AL.,

Respondents.

On Petitions for Writs of Certiorari to the Circuit Courts of Brooke County and Roane County, West Virginia

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BRIEF FOR AMICUS CURIAE THE AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
INTRODUCTION	4
REASONS FOR GRANTING THE WRIT	5
I. THE COURT SHOULD CLARIFY THAT THE DUE PROCESS CLAUSE IMPOSES MEANINGFUL LIMITS ON ALL PUNITIVE AWARDS, NOT MERELY THOSE WITH HIGH RATIOS OF PUNITIVE TO COMPENSATORY DAMAGES	5
II. THIS COURT'S INTERVENTION IS PARTICULARLY WARRANTED IN LIGHT OF THE FAILURE OF THE WEST VIRGINIA COURTS TO ENGAGE IN MEANINGFUL REVIEW OF THESE AWARDS	13
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES:

10K, L.L.C. v. *W.V.S.V. Holdings, L.L.C.*, No. CV 2003-008362 (Ariz. Sup. Ct. 2007) 10

Adidas Am., Inc. v. *Payless Shoesource, Inc.*, 2008 U.S. Dist. LEXIS 69260 (D. Or. 2008) 10

Am. Ry. Express Co. v. *Levee*, 263 U.S. 19 (1923) 17

Angel v. *Bullington*, 330 U.S. 183 (1947) .. 17

Atler v. *Murphy Enters.*, 136 N.M. 701 (N.M. Ct. App. 2004) 12

Banco Espirito Santo Int'l v. *BDO Seidman*, No. 2004-14009-CA-31 (Fla. Cir. Ct. 2007) 10

Bocci v. *Key Pharms., Inc.*, 76 P.3d 669 (Or. Ct. App.), *modified*, 79 P.3d 908 (Or. Ct. App. 2003) 7-8

BMW of N. Am. v. *Gore*, 517 U.S. 559 (1996) 6, 7, 9, 11

Cambio Health Solutions LLC v. *Reardon*, 2007 WL 627834 (6th Cir. Feb. 27, 2007) 7

Casciola v. *F.S. Air Serv., Inc.*, 120 P.3d 1059 (Alaska 2005) 12

TABLE OF AUTHORITIES—Continued

	Page
Century Surety Co. v. *Polisso*, 43 Cal. Rptr. 3d 468 (Cal. Ct. App. 2006)	12
Cooper Indus. v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001)	4, 5
Diesel Mach., Inc. v. *B.R. Lee Indus., Inc.*, 418 F.3d 820 (8th Cir. 2005)	12
Exxon Shipping Co. v. *Baker*, 128 S. Ct. 2605 (2008)	5, 6, 8
Galindez v. *Narragansett Hous. Assocs., L.P.*, *2006 Del. Super. LEXIS 476* (Del. Super. Ct. Nov. 28, 2006)	7
Greenberg v. *Paul Revere Life Ins. Co.*, 91 Fed. App'x 539 (9th Cir. 2004)	7
Honda Motor Co. v. *Oberg*, 512 U.S. 415 (1994)	16
L-3 Commc'ns Corp. v. *OSI Sys.*, 2008 U.S. App. LEXIS 13645 (2d Cir. 2008)	10
Leary v. *State Farm Mut. Auto. Ins. Co.*, 978 So. 2d 1094 (La. Ct. App. 2008)	12
Motorola Credit Corp. v. *Uzan*, 509 F.3d 74 (2d Cir. 2007)	10
Murray v. *Charleston*, 96 U.S. 432 (1878).	13
Norfolk & W. Ry. Co. v. *Ayers*, 538 U.S. 135 (2003)	18
Norris v. *Alabama*, 294 U.S. 587 (1935)	17

TABLE OF AUTHORITIES—Continued

	Page
Pacific Mut. Life Ins. Co. v. *Haslip*, 499 U.S. 1 (1991)	8
Poliner v. *Tex. Health Sys.*, 537 F.3d 368 (5th Cir. 2008)	10
Rogers v. *Alabama*, 192 U.S. 226 (1904)	17
Rowatt v. *Wyeth Pharm., Inc.*, No. 04-01699 (Nev. Dist. Ct. 2007)	10
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Union Pac. R.R. Co. v. *Barber*, 149 S.W.3d 325 (Ark. 2004)	7
Watson v. *E. S. Sutton, Inc.*, 225 Fed. Appx. 3 (2d Cir. 2006)	12
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TABLE OF AUTHORITIES—Continued

Page

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TABLE OF AUTHORITIES—Continued

Page

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BRIEF FOR AMICUS CURIAE THE AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Amicus curiae the American Chemistry Council ("ACC"),[1] represents the leading companies engaged

[1] No counsel for a party authored this brief in whole or in

in the business of chemistry, a $635 billion dollar industry that accounts for ten cents of every dollar in U.S. exports. ACC members apply the science of chemistry to create and manufacture innovative products and services that make the lives of people throughout this nation and abroad better, safer, and healthier. In support of these objectives, ACC regularly files briefs as amicus curiae in this Court and in other courts in cases that are significant to its members.

Like other businesses, ACC members are vitally interested in ensuring that courts undertake the rigorous and meaningful review of punitive damages mandated by this Court's precedents, which aim to eliminate the arbitrary nature and potentially crippling effects of such awards. ACC also has a particular interest in ensuring that this review occurs with respect to awards rendered in the State of West Virginia. ACC member companies comprise an important part of the West Virginia business community, having contributed $14.1 billion dollars to that State's economy in 2007 alone. *See* American Chemistry Council, *Snapshot of the Chemical Industry in West Virginia 2007*. As such, ACC members are unfortunately all too familiar with excessive punitive damage awards in West Virginia. Of the seven largest damage awards in the United States in 2007, three were imposed by West Virginia juries,

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part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to S. Ct. R. 37.2(a), counsel of record for all parties received timely notice of the intent to file this brief. The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk.

including the two nine-digit awards at issue in these cases. *See* Verdict Search, *Top Verdicts of 2007*. The third such award, which included $196.2 million in punitive damages, was imposed against an ACC member. *See Perrine* v. *E.I. DuPont de Nemours & Co.*, No. 081461 (W. Va.) (petition for review filed June 24, 2008). To date, none of these awards has been reduced or reversed.

Unchecked punitive awards threaten to stifle the Nation's economy by destroying the legal predictability upon which investments are predicated. Accordingly, this Court, through its faithful application of the Due Process Clause of the U.S. Constitution, has sought to limit the arbitrary and excessive nature of punitive damage awards by setting forth standards under which courts must rigorously evaluate them. But the standards are meaningful only to the extent the lower courts will consistently apply them in a rigorous manner. Unfortunately, that consistency has been lacking, particularly in West Virginia, where there is no appellate review as of right and where trial courts too often view the due process review mandated by this Court as little more than a ministerial act to be quickly passed over on the way to confirmation of the jury's award.

ACC therefore urges the Court to grant review in these cases, to clarify that the Due Process Clause imposes real limits on all punitive awards—not merely those with numerically high ratios of compensatory to punitive damages—and to ensure the meaningful review of these massive punitive awards that the West Virginia courts declined to provide.

INTRODUCTION

This Court has emphasized the need for a "thorough, independent review" of the record and "[e]xacting appellate review" of punitive damage awards, to ensure that such awards are not grossly excessive in violation of the Due Process Clause of the Constitution. *Cooper Indus.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 441 (2001); *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 418 (2003). In these cases, however, trial judges in West Virginia essentially rubberstamped two massive punitive awards—totaling $370 million—with only perfunctory review. And far from engaging in the requisite thorough and exacting review mandated by the Due Process Clause, the Supreme Court of Appeals of West Virginia—the only appellate court in the State—*denied* review of these awards altogether.

These exceptional cases warrant this Court's intervention. The Court should clarify that the Due Process standards are not merely boxes to be checked off but rather require an extensive multifactor judicial review as to the excessiveness of each award, regardless of the precise numerical ratio of compensatory to punitive damages and regardless of whether the conduct at issue could be labeled reprehensible in some sense of that word. The Court should further clarify that, in the event the Supreme Court of Appeals of West Virginia declines to do so, this Court will safeguard the federal constitutional rights of defendants in that State by conducting the requisite thorough and exacting review on its own in extraordinary cases such as these.

Members of the ACC comprise a prominent part of the West Virginia business community, and have

experienced first-hand the dangers inherent in allowing trial judges virtual free rein—unconstrained by any mandatory appellate review—to uphold devastating punitive jury awards. ACC therefore urges this Court to accept review in these cases, so as to provide the searching evaluation and protection of federal constitutional rights that the West Virginia courts have declined to provide.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD CLARIFY THAT THE DUE PROCESS CLAUSE IMPOSES MEANINGFUL LIMITS ON ALL PUNITIVE AWARDS, NOT MERELY THOSE WITH HIGH RATIOS OF PUNITIVE TO COMPENSATORY DAMAGES.

Only months ago, this Court held that, even in the absence of a proliferation of runaway punitive awards, there still remains a "need to protect against the possibility * * * of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution." *Exxon Shipping Co.* v. *Baker*, 128 S. Ct. 2605, 2633 (2008). Thus, this Court has emphasized that *every* jury award of punitive damages must survive exacting scrutiny under the Due Process clause and also must be subject to meaningful appellate review.[2] "Exacting appellate review ensures that an award of punitive damages is based upon an 'application of the law' rather than a deci-

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[2] *See, e.g.*, *Exxon*, 128 S. Ct. at 2605 ("[O]ur cases have announced due process standards that *every* award must pass.") (emphasis added); *Cooper Indus.*, 532 U.S. at 436 ("courts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards").

sionmaker's caprice.'" *State Farm*, 538 U.S. at 418 (internal quotation omitted).

The linchpins of this scrutiny are the three "guideposts" announced in *BMW of N. Am.* v. *Gore*, 517 U.S. 559, 574-75 (1996), and the Court has not hesitated to apply them to strike down excessive punitive awards. *See State Farm*, 538 U.S. at 425; *BMW*, 517 U.S. 574-75. They are (1) the degree of reprehensibility of the defendant's misconduct; (2) the ratio of punitive damages to the actual or potential harm to the plaintiff, which is generally (but not always) measured by the compensatory damages; and (3) the relationship between the award and civil fines authorized or imposed for similar misconduct.

These guideposts were dictated by the precept that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574. As the Court noted recently, "[t]he real problem * * * is the stark unpredictability of punitive awards," which prevents defendants from looking ahead "with some ability to know what the stakes are in choosing one course of action or another." *Exxon*, 128 S. Ct. at 2625, 2627.

But the Court's standards are meaningful only if they are actually applied by the lower courts in a meaningful way. Otherwise, the unpredictability of local juries will simply be exacerbated by the unpredictability in how local courts review those juries' actions. The lower courts, however, differ greatly in how rigorously they apply this Court's standards. The result—especially in West Virginia, which has

no mandatory appellate review—has been realization of the very danger that those standards seek to avoid: the arbitrary imposition of excessive punitive awards according to standards that vary from court to court. The cases at bar provide an excellent vehicle for the Court to clarify that all three *BMW* guideposts are real limitations to be applied searchingly in every case, and not merely hoops through which judges must jump on their way to confirming awards.

1. Many courts have incorrectly viewed punitive awards that are a single-digit multiple of the compensatory award as largely insulated from meaningful due process scrutiny.[3] While awards with high

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[3] *See, e.g.*, *Cambio Health Solutions, LLC* v. *Reardon*, 2007 WL 627834, at *7 (6th Cir. Feb. 27, 2007) ($5 million punitive award that was 5.65 times compensatory damages and prejudgment interest is "well within the Supreme Court's single-digit prescription"); *Stogsdill* v. *Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004) (4:1 ratio acceptable even when compensatory award is substantial and punitive award of $2 million is many times defendant's net worth); *Greenberg* v. *Paul Revere Life Ins. Co.*, 91 Fed. App'x 539, 542 (9th Cir. 2004); ($2.4 million punitive award permissible because ratio at issue was "similar to the 4:1 ratio in BMW and well within the 'single digit ratio' that marks the outer limits of permissible disparities"); *Zhang* v. *Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003) (upholding $ 2.6 million punitive award and ratio of "slightly more than seven to one"); *Trinh* v. *Gentle Commc'ns, LLC*, 71 Mass. App. Ct. 368 (Mass. App. Ct. 2008) (slightly less than 4:1 ratio acceptable); *Galindez* v. *Narragansett Hous. Assocs., L.P.*, 2006 Del. Super. LEXIS 476 (Del. Super. Ct. Nov. 28, 2006) (ratio of 3.3:1 does not shock the court's conscience); *Union Pac. R.R. Co.* v. *Barber*, 149 S.W.3d 325, 348 (Ark. 2004) ($25 million punitive award appropriate because a 5:1 ratio is not "breathtaking"); *Bocci* v. *Key Pharms., Inc.*, 76 P.3d 669, 675 (Or. Ct. App.) (stating that 4:1 ratio "is something of a benchmark for the United States Supreme

ratios are almost always unconstitutionally excessive, the obverse is not true: the mere fact that a substantial award may involve a single-digit, or less than one-to-one, ratio cannot insulate the award from meaningful scrutiny. There is no "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 18 (1991). Thus, while a one-to-one ratio is a general "outermost limit" when compensatory awards are substantial, *Exxon*, 128 S. Ct at 2626; *State Farm*, 538 U.S. at 425, the limit for any particular award may well be lower, in light of the magnitude of the award, the degree of reprehensibility, the actual harm to the plaintiff caused by the egregious conduct, comparative civil penalties, and other factors.

These cases amply illustrate this point. The trial courts' consideration of the ratio of punitive damages to compensatory damages was cursory at best. In *Massey*, the court's analysis of the relationship between the $100 million punitive award and the $119 million compensatory award rested solely upon its superficial observation that the "punitive damages are less than the compensatory damage award." *Massey* Pet. App. 11a. For its part, the *NiSource* trial court flatly refused to consider this Court's guidance in *State Farm* suggesting that a one-to-one ratio was the outer limit for punitive awards, on the ground that the $134 million compensatory award was "not substantial" because it was to be shared among a class of plaintiffs. *NiSource* Pet. App. 101a-

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Court" and reducing 45:1 ratio to 7:1), *modified*, 79 P.3d 908 (Or. Ct. App. 2003).

127a. Similarly, in the *Perrine* v. *DuPont* case, which is currently pending on petition seeking review by the Supreme Court of Appeals of West Virginia, the trial court dismissed concerns over a $196.2 million punitive award on the cursory conclusion that either a 1:1 or 3.5:1 ratio (depending on which non-punitive damages are included in the ratio) was "constitutionally sound" under this Court's precedents. Order Denying DuPont's Motion to Vacate or Reduce Punitive Damages Award, *Perrine* v. *DuPont E.I. de Nemours & Co.*, No. 04-C-296-2 (W. Va. Cir. Ct. Feb. 25, 2008).

A very large punitive award on top of a very large compensatory award, even where the ratio is relatively low, will raise more serious due process concerns than a small punitive award on top of a small compensatory award where the ratio is high. For example, a $100 punitive award on top of a $10 compensatory award is hardly momentous even though the ratio is ten-to-one. But a $100 million punitive award on top of an equally large compensatory award mandates searching review based on the magnitude of the award alone. As the Court has observed, even a $2 million dollar punitive award—a tiny fraction of the awards made in the present cases—is "tantamount to a severe criminal penalty." *BMW*, 517 U.S. at 585.

The ultimate question as to the constitutionality of any punitive award is whether the conduct at issue "warrant[s] the imposition of further sanctions to achieve punishment or deterrence" and whether the amount of such sanction is greater than reasonably necessary to achieve the State's goals in imposing punitive damages. *State Farm*, 538 U.S. at 419. Under any meaningful degree of scrutiny, the recent

nine-digit awards in West Virginia are grossly disproportionate to any legitimate need for punishment or deterrence, regardless of the ratio of compensatory to punitive damages. These three massive awards alone threaten to extract more than $566 million from the defendants, a figure equivalent to 15% of the 2007 annual revenues for the entire State of West Virginia. *See* West Virginia State Budget Office, *Governor's FY 2009 Budget Report*, at 16.

Although jurors may perceive such windfalls as economically beneficial to their State or their fellow citizens, especially when imposed on large and often out-of-state corporations, meaningful judicial review is necessary to ensure that these impulses are cabined by rationality. And while West Virginia is of particular concern, the problem is not limited to that State. Just in the last two years, there have been at least ten verdicts throughout the country—including the three in West Virginia—where the punitive damages exceeded $50 million but the ratio of punitive to compensatory damages was less than four-to-one.[4] Notably, however, many of these awards have

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[4] *Motorola Credit Corp.* v. *Uzan*, 509 F.3d 74 (2d Cir. 2007) ($1 billion punitive award; 0.5:1 ratio); *Poliner* v. *Tex. Health Sys.*, 537 F.3d 368 (5th Cir. 2008) ($100 punitive award; 0.9:1 ratio; reversed); *L-3 Commc'ns Corp.* v. *OSI Sys.*, 2008 U.S. App. LEXIS 13645, 1-2 (2d Cir. 2008) ($96 million punitive award; 2.9:1 ratio; reversed); *Adidas Am., Inc.* v. *Payless Shoesource, Inc.*, 2008 U.S. Dist. LEXIS 69260 (D. Or. 2008) ($137 million punitive award; 0.82:1 ratio; remitted); *Banco Espirito Santo Int'l* v. *BDO Seidman*, No. 2004-14009-CA-31 (Fla. Cir. Ct. 2007) ($351 million punitive award, 2.1:1 ratio); *10K, L.L.C.* v. *W.V.S.V. Holdings, L.L.C.*, No. CV 2003-008362 (Ariz. Sup. Ct. 2007) ($150 million punitive award; 0.71:1 ratio); *Rowatt* v. *Wyeth Pharm., Inc.*, No. 04-01699 (Nev. Dist. Ct. 2007) ($99 million punitive award, 2.8:1 ratio).

been vacated, reversed, or reduced on judicial review but *not* those in West Virginia.

Regardless of how common such awards are, businesses will still face intolerable and unconstitutional unpredictability in the absence of consistent and rigorous application of this Court's due process standards. The mere specter that juries will award arbitrary nine-digit punitive awards and that courts will routinely uphold them with only cursory review is itself sufficient to deter the investment necessary for continued economic growth. This Court should therefore grant certiorari in these cases to convey to the lower courts the message that *all* punitive awards are to be subjected to meaningful judicial scrutiny.

2. Many courts also give little more than superficial attention to the relationship between awards of punitive damages and the degree of the defendant's reprehensibility. As this Court has emphasized, a punitive award does not satisfy due process merely because it could be characterized as "reprehensible" in some sense of that word. For *all* punitive damage awards, in order to be permissible in any amount, must cross the reprehensibility threshold. Rather, the Court has explained that the due process inquiry requires measuring the award against the "*degree* of reprehensibility." *BMW*, 517 U.S. at 575 (emphasis supplied).

It is therefore insufficient for a reviewing court to say that a defendant's conduct is reprehensible and declare its job done. Yet many courts have done essentially that, viewing the reprehensibility guidepost as little more than a box to be checked off rather than a searching inquiry that balances the degree of

culpability against the magnitude of the award and all other relevant factors. *See, e.g.*, *Diesel Mach., Inc.* v. *B.R. Lee Indus., Inc.*, 418 F.3d 820, 839-40 (8th Cir. 2005); *Watson* v. *E. S. Sutton, Inc.*, 225 Fed. Appx. 3, 5 (2d Cir. 2006); *Century Surety Co.* v. *Polisso*, 43 Cal. Rptr. 3d 468, 498-99 (Cal. Ct. App. 2006); *Casciola* v. *F.S. Air Serv., Inc.*, 120 P.3d 1059, 1068 (Alaska 2005); *Leary* v. *State Farm Mut. Auto. Ins. Co.*, 978 So. 2d 1094, 1102 (La. Ct. App. 2008); *Trinh*, 71 Mass. App. Ct. at 368; *Atler* v. *Murphy Enters.*, 136 N.M. 701, 709 (N.M. Ct. App. 2004).

The present cases highlight the lower courts' misapplication of the due process guideposts. The *Massey* court upheld a punitive award of $100 million dollars based on its conclusion that the petitioners' behavior in a garden-variety commercial contract dispute was "reprehensible." *Massey* Pet. App. 11a. But the court made no mention of the *degree* of the reprehensibility, and gave no explicit consideration of the numerous factors this Court set forth in *State Farm* to guide the reprehensibility inquiry. *Compare id.* with *State Farm*, 538 U.S. at 419. Similarly, the trial court in *NiSource* ignored the *State Farm* factors and merely concluded that the defendants were "significantly reprehensible" when they underpaid royalties based on their interpretation of an ambiguous contract and hedged against declining prices. *NiSource* Pet. App. 105a, 112a-113a, 86a, 88a. This "significant reprehensibility," according to the court, justified a $270 million dollar punitive damages award on top of $134 million in compensatory damages (much of which the trial court admitted could not support any punitive damages). No consideration was given to whether the compensa-

tory damages awarded had already satisfied the societal interest in appropriate deterrence.

Just as a single-digit or even lower ratio of compensatory to punitive damages does not demonstrate the constitutionality of a punitive award, so too a determination that conduct is "reprehensible" cannot short-circuit that inquiry either. The awards at issue in these cases—both of which are simply garden-variety contract disputes dressed up in the garb of fraud claims—afford the Court with an excellent opportunity to provide much needed guidance to the lower courts on this point.

II. THIS COURT'S INTERVENTION IS PARTICULARLY WARRANTED IN LIGHT OF THE FAILURE OF THE WEST VIRGINIA COURTS TO ENGAGE IN MEANINGFUL REVIEW OF THESE AWARDS.

Certiorari would be warranted in these cases regardless of what state they came from. But the need for this Court's intervention is particularly important given that these awards were issued by West Virginia juries with no meaningful review by the trial court and no review at all by the Supreme Court of Appeals of West Virginia. If the West Virginia courts elect not to engage in the meaningful due process review mandated by this Court's precedents, then this Court should step in to ensure that the dictates of the Constitution are followed with respect to these massive verdicts. *See Murray* v. *Charleston*, 96 U.S. 432, 441 (1878) ("Wherever rights acknowledged and protected by [the Constitution] are denied or invaded under the shield of State legislation, this court is authorized to interfere.").

For each of the past three years, the U.S. Chamber of Commerce has ranked West Virginia's legal climate as the nation's absolute worst for businesses.[5] Essential to these overall rankings is each State's ranking on criteria such as verdict predictability, judges' impartiality, and punitive damage awards. *See, e.g.*, U.S. Chamber Institute for Legal Reform, *Legal Climate 2008*. West Virginia is consistently ranked at or near the bottom of the Nation in each of these categories. *Id.* at 18, 23, 25. It is this climate that allowed a relatively small State, ranked 37th in the nation in population, to produce three of the Nation's top seven verdicts in 2007. *See also* American Tort Reform Ass'n, *Judicial Hellhole Reports* (West Virginia consistently included in nationwide list of judicial "hellholes" since 2003 and is the only state-wide "hellhole").

Largely unrestrained punitive damages awards have had a palpable effect upon businesses operating within the state of West Virginia. The enormous judgment against one of the *NiSource* petitioners caused that company, immediately after the West Virginia Supreme Court of Appeals denied review, to cancel its decision to locate a $35 million regional headquarters in Charleston, West Virginia. George Hohmann, *Chesapeake Energy Kills $35 Million Regional Headquarters Plans*, Charleston Daily Mail, May 29, 2008, at 1A. Moreover, the $196.2 million in punitive damages awarded in the *Perrine* v. *DuPont* case represents more than 10% of the value of the gross state product contributed to West

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[5] *See* U.S. Chamber Institute for Legal Reform, *Legal Climate 2008*; U.S. Chamber Institute for Legal Reform, *Legal Climate 2007*; U.S. Chamber Institute for Legal Reform, *2006 U.S. Chamber of Commerce State Liability Ranking Study*.

Virginia's state economy by the entire chemical industry for the year 2007. American Chemistry Council, *Snapshot of the Chemical Industry in West Virginia 2007*.

West Virginia's toxic litigation climate has also stifled small businesses. A recent survey of West Virginia small business owners indicated that 60% were concerned about the impact of frivolous lawsuits upon their businesses. Chris Dickerson, *West Virginia Small Business Owners Fear "Unfair" Lawsuits, Study Finds*, The Record, May 27, 2007, at 1. These small business owners are understandably concerned. In 2005, small businesses nationwide incurred $98 billion in tort-related costs, of which $20 billion came from the assets of those businesses rather than insurance. U.S. Chamber Institute for Legal Reform, *Tort Liability Costs for Small Businesses* (May 2007), at 1. The West Virginia Chamber of Commerce has thus recognized that the unpredictable civil justice system in its State "is a consistent drag" on West Virginia's economic growth. West Virginia Chamber of Commerce, *Policy Papers 2009*.

In other States, the arbitrariness of trial court punitive damages awards would be mitigated by the availability of appellate judicial review, usually in the form of one mandatory and one discretionary level of review. But that is not so in West Virginia, which does not provide for any appeal of right in any civil cases. Instead, a would-be appellant must apply to the Supreme Court of Appeals of West Virginia for a discretionary grant of appellate review. As a result, in these cases there was *no* appellate review at all. Despite the nine-figure punitive awards, one of which was the largest punitive award in West Virginia history, the Supreme Court of Appeals

denied the petitions for review in both cases with no explanation. *See Massey* Pet. App. 18a ("Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal."); *Ni-Source* Pet. App. 2a (same).

In fact, the percentage of all cases in which the West Virginia Supreme Court of Appeals has granted review has dropped precipitously over the past few years. Eight years ago, that court granted appeal in 52% of the 3,403 petitions presented to it. *See* Court of Appeals of West Virginia, *2006 Statistical Report* at 13. But by 2006, the last year for which data are available, appeal was granted only 11% of the time although the total number of petitions had dropped by 24% to 2,589. *Id.* There is a similar pattern of decline in the number of appeals granted in purely civil cases. In 2001, appeal was granted in 39% of such petitions. *Id.* at 13. But by 2006, that percentage had been almost cut in half, to 21%. *Id.* Yet during the same time period, the number of civil petition filings dropped by 23%. *Id.* at 10. Thus, at a time when the total dollar value of punitive awards is increasing, the availability of appellate review in West Virginia appears to be decreasing.

This confluence of events leaves litigants in West Virginia subject to the whims of parochial juries and the potential caprice of local elected trial court judges. The dangers of unconstrained jury verdicts are well-recognized. *See Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 432 (1994) (discretionary nature of punitive awards, coupled with evidence of defendant's net worth, "creates the potential that juries will use their verdicts to express biases against big businesses"). But those dangers are greatly exacerbated in West Virginia. Given that there is no

mandatory appellate review of their decisions, trial judges in that State necessarily have reduced incentives to conform their rulings to the dictates of higher authorities. Such arbitrariness is what the Due Process Clause forbids and what exacting appellate review is supposed to prevent. *State Farm*, 538 U.S. at 418.

"[A] right without a remedy is no right at all." *Angel* v. *Bullington*, 330 U.S. 183, 209 (1947). Thus, the Court has not hesitated to grant certiorari to protect federal rights when state courts would not or could not afford the same protection. *See, e.g.*, *Rogers* v. *Alabama*, 192 U.S. 226, 230 (1904) ("It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."). Similarly, the Court has made clear that state courts cannot deprive litigants of constitutional rights by relying on the vagaries of local practice. *Am. Ry. Express Co.* v. *Levee*, 263 U.S. 19, 21 (1923) ("The law of the United States cannot be evaded by the forms of local practice."). Review and reversal by this Court is proper when a State treads carelessly on important federal rights. *Norris* v. *Alabama*, 294 U.S. 587, 590 (1935). "Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights." *Id.*

To be sure, the abdication of the West Virginia courts of their responsibility to meaningfully review these punitive awards presents different concerns than earlier efforts by state courts to ignore other federal constitutional rights. But the basic principles are the same. In far less momentous circumstances, this Court has not allowed the West Virginia Supreme Court of Appeals' denial of appeal to insu-

late a case from certiorari review. *See Norfolk & W. Ry. Co.* v. *Ayers*, 538 U.S. 135 (2003). Unless this Court intervenes in these cases, the result will be continued uncertainty and unpredictability in the imposition and review of punitive awards in West Virginia. This Court should provide the requisite meaningful review in these important cases, given that the only appellate court in the State has chosen not to.

CONCLUSION

For the foregoing reasons, and those set forth in the petitions, the petitions should be granted and the judgments below reversed.

Respectfully submitted,

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